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The "Transient Rule" of Personal Jurisdiction: A Well-Intentioned Concept That Has Overstayed Its Welcome

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THE "TRANSIENT RULE" OF PERSONAL JURISDICTION: A WELL-INTENTIONED CONCEPT THAT HAS OVERSTAYED ITS WELCOME

I. INTRODUCTION

In *Pennoyer v. Neff*,[1] the United States Supreme Court deemed that service of process on an individual physically present in the forum is a sufficient basis for the state to exercise in personam jurisdiction.[2] This concept, generally known as "transient jurisdiction,"[3] has been upheld over the past 111 years based on the simple rationale that a state has complete authority over persons and things within its borders.[4] After *Pennoyer*, courts regularly upheld a forum's power over individuals on the basis of presence in

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1. 95 U.S. 714 (1878), *rev'd*, 326 U.S. 310 (1945).

2. *Id.* at 720. The term "in personam jurisdiction" refers to the power which a court has over the defendant himself in contrast to the court's power over the defendant's interest in property (quasi in rem) or power over the property itself (in rem). BLACK'S LAW DICTIONARY 711 (5th ed. 1979). A court which lacks personal jurisdiction is without power to issue an in personam judgment.

3. The term "transient jurisdiction" refers to jurisdiction over persons temporarily present in the forum. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 410 (3d ed. 1986). Commentators have variously labeled the concept of transient jurisdiction. *See, e.g.*, Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 289 (1956) (labeling the concept of transient jurisdiction as the "transient rule"); Posnak, *A Uniform Approach to Judicial Jurisdiction After* World-Wide *and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729 (1981) (referring to transient jurisdiction as the "Gotcha" theory). Professor Ehrenzweig has also referred to transient jurisdiction using the "catch-as-catch-can" terminology. *See* Ehrenzweig, *supra* at 306. This author prefers to use the term "transient rule."

4. *Pennoyer*, 95 U.S. at 722. The Court in *Pennoyer* based transient jurisdiction on the territorial conception of judicial power that a state has authority over all persons and property within its borders. *See* McDonald v. Mabee, 243 U.S. 90, 91 (1917). The *Pennoyer* Court stated this territorial power theory in the following passage:

> The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil *status* and capacities of its inhabitants. . . . The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

that forum.[5] Many commentators, however, consider *Pennoyer's* application to be outdated and inconsistent with later Supreme Court decisions.[6]

The decision given landmark status with regard to transient jurisdiction is *Shaffer v. Heitner*.[7] The Supreme Court's decision in *Shaffer* related only to quasi in rem and in rem jurisdiction.[8] However, many subsequent deci-

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95 U.S. at 722 (citations omitted) (emphasis supplied by the Court). This "territorial power" theory led to the Supreme Court decision in International Shoe Co. v. Washington, 326 U.S. 310 (1945), which introduced a "reasonableness test" and "fairness doctrine" as a basis for a "minimum contact" analysis. For a discussion of *International Shoe*, see *infra* notes 21-30 and accompanying text.

5. *See, e.g.*, Fitzhugh v. Reid, 252 F. 234, 237 (E.D. Ark. 1918) (upholding jurisdiction over defendant served while in forum for medical treatment); Grace v. MacArthur, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (upholding jurisdiction over defendant served while flying over forum); Nielsen v. Braland, 264 Minn. 481, 484, 119 N.W.2d 737, 739 (1963) (upholding jurisdiction over defendant served while traveling through forum); *see also* Lee v. Baird, 139 Ala. 526, 528, 36 So. 720, 720 (1904) (upholding jurisdiction over defendant served while traveling through forum); Fisher, Brown & Co. v. Fielding, 67 Conn. 91, 104, 34 A. 714, 715 (1895) (upholding jurisdiction over defendant served while in forum on business unrelated to cause of action).

6. *See, e.g.*, Bernstine, Shaffer v. Heitner: *A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38 (1979); Brilmayer, Haverkamp, Logan, Lynch, Neuwirth and O'Brien, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 749 (1988) [hereinafter Brilmayer]; Fyr, Shaffer v. Heitner: *The Supreme Court's Latest Last Words on State Court Jurisdiction*, 26 EMORY L.J. 739 (1977); Lacy, *Personal Jurisdiction and Service of Summons After* Shaffer v. Heitner, 57 OR. L. REV. 505 (1978); Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of* Shaffer v. Heitner, 63 IOWA L. REV. 1031 (1978); Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33 (1978); Vernon, *Single-Factor Bases of In Personam Jurisdiction — A Speculation on the Impact of* Shaffer v. Heitner, 1978 WASH. U.L.Q. 273 (1978); Vernon, *State-Court Jurisdiction: A Preliminary Inquiry Into the Impact of* Shaffer v. Heitner, 63 IOWA L. REV. 997 (1978); Werner, *Dropping the Other Shoe*: Shaffer v. Heitner *and the Demise of Presence-Oriented Jurisdiction*, 45 BROOKLYN L. REV. 565, 572 (1979); Zammit, *Reflections on* Shaffer v. Heitner, 5 HASTINGS CONST. L.Q. 15 (1978); Note, *The Physical Presence Basis of Personal Jurisdiction Ten Years After* Shaffer v. Heitner: *A Rule in Search of a Rationale*, 62 NOTRE DAME L. REV. 713 (1987); *see also* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1064, at 251-53 (2d ed. 1987). *But see* Abrams, *Power, Convenience and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 4 (1982) (contending that there is no constitutional ban to transient jurisdiction); Glen, *An Analysis of "Mere Presence" and Other Traditional Bases of Jurisdiction*, 45 BROOKLYN L. REV. 607, 611 (1979) (asserting that transient jurisdiction is appropriate if an individual entered a forum purposefully).

7. 433 U.S. 186 (1977).

8. The term "quasi in rem" jurisdiction refers to the "[t]ype of jurisdiction of a court based on a person's interest in property within the jurisdiction of the court. There must be a connection involving minimum contact between the property and the subject matter of the action for a state to exercise quasi in rem jurisdiction." BLACK'S LAW DICTIONARY 1121 (5th ed. 1979) (citing *Shaffer*, 433 U.S. 186).

The term "in rem jurisdiction" is "[a] technical term used to designate proceedings or actions instituted *against the thing*, in contradistinction to personal actions, which are said to be in personam." BLACK'S LAW DICTIONARY at 713 (emphasis in original).

The *Shaffer* Court further indicated that there must be a connection involving "minimum contacts" between the property and the subject matter of the action for a state to exercise quasi in

sions have relied on *Shaffer* to determine whether transient jurisdiction can be exercised simply by serving the defendant in the forum state.[9]

This Comment will discuss whether the standards applied in *Shaffer* to quasi in rem and in rem actions should be extended to personal jurisdiction based on the concept of transient jurisdiction. Many courts still apply the "transient rule"[10] while others have specifically overruled it.[11] This Comment will explain why the United States Supreme Court should take a final step to abolish the "transient rule."

Transient jurisdiction is outdated and should be abolished. The United States Supreme Court has developed a "minimum contacts" standard that should be applied to all cases of in personam jurisdiction.[12] Each state has also developed its own statutes to govern the sufficiency of a defendant's activities in the forum state.[13] By eliminating the concept of transient jurisdiction and by applying the "minimum contacts" rationale, in personam jurisdiction will become more "fair" to defendants. It will not inhibit their right to travel[14] and will relieve many courts from the burdensome task of examining claims of immunity from transient jurisdiction[15] or claims for dismissal due to venue problems.[16]

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rem jurisdiction. *Shaffer*, 433 U.S. at 207. For a discussion of *Shaffer*, see *infra* notes 40-46 and accompanying text.

9. *See, e.g.*, Telco Leasing, Inc. v. Marshall County Hosp., 586 F.2d 49 (7th Cir. 1978); Church of Scientology v. Adams, 584 F.2d 893 (9th Cir. 1978); Hutson v. Fehr Bros., 584 F.2d 833 (8th Cir. 1978), *cert. denied sub nom.* Fehr Bros. v. Acciaierie Weissenfels, 439 U.S. 983 (1978); Toro Co. v. Ballas Liquidating Co., 572 F.2d 1267 (8th Cir. 1978); Empire Abrasive Equip. Corp. v. H.H. Watson, Inc., 567 F.2d 554 (3d Cir. 1977); Bethany Auto Sales, Inc. v. Aptco Auto Auction, Inc., 564 F.2d 895 (9th Cir. 1977); Miller Brewing Co. v. Acme Process Equip. Co., 441 F. Supp. 520 (E.D. Wis. 1977); Pavlo v. James, 437 F. Supp. 125 (S.D.N.Y. 1977); Merkel Assoc., Inc. v. Bellowfram Corp., 437 F. Supp. 612 (W.D.N.Y. 1977); Braband v. Beech Aircraft Corp., 72 Ill. 2d 548, 382 N.E.2d 252 (1978), *cert. denied*, 442 U.S. 928 (1978); Glading v. Furman, 282 Md. 200, 383 A.2d 398 (1978); Droukas v. Divers Training Academy, Inc., 375 Mass. 149, 376 N.E.2d 548 (1978); Town of Haverhill v. City Bank & Trust Co., 119 N.H. 409, 402 A.2d 185 (1979); Moon Carrier v. Reliance Ins. Co., 153 N.J. Super. 312, 379 A.2d 517 (1977).

10. *See infra* notes 69-100 and accompanying text.

11. *See infra* notes 102-20 and accompanying text.

12. *See infra* notes 27-28 and accompanying text.

13. *See infra* notes 181-207, 236-45 and accompanying text.

14. *See infra* notes 128-37, 218-24 and accompanying text.

15. *See infra* notes 138-69 and accompanying text.

16. *See infra* notes 170-80 and accompanying text.

II. THE "TRANSIENT RULE": ITS HISTORICAL EVOLUTION

During the seventy years between *Pennoyer v. Neff*[17] and *International Shoe Co. v. Washington*,[18] physical presence was the basis of jurisdiction. Generally, service of process within the forum was sufficient to confer in personam jurisdiction. Before modern transportation, traveling was difficult and courts were concerned that defendants could evade suit by avoiding forums in which potential plaintiffs resided. Therefore, after *Pennoyer*, courts regularly upheld a forum's power over individuals on the basis of the person's presence in the forum when served with process.[19] From 1945 to the present, however, courts have indirectly eroded the "transient rule" due to the increased mobility of defendants and the harshness of the rule.[20]

A. International Shoe and Its Progeny: The Erosion Process

The erosion of the "transient rule" can be illustrated by an examination of the United States Supreme Court decision in *International Shoe* and its progeny.[21] In *International Shoe*, the state of Washington attempted to collect unpaid unemployment compensation taxes from a foreign corporation.[22] Although the corporation had no office in the state, it employed about a dozen salesmen over a period of several years to solicit orders for the shoes manufactured by the corporation. It forwarded those orders to the corporation's main office in St. Louis, Missouri.[23]

The Washington unemployment compensation statute authorized an administrative proceeding to collect the unemployment tax from delinquent employers. It directed that notice of any such assessment be served personally upon the employer, if the employer could be found within the state of Washington. If not so found, the employer could be served by registered mail sent to his last known address.[24] With regard to the International

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17. 95 U.S. 714 (1878).

18. 326 U.S. 310 (1945).

19. *See, e.g.*, Fitzhugh v. Reid, 252 F. 234, 237 (E.D. Ark. 1918) (upholding jurisdiction over defendant served while in forum at health spa); Grace v. MacArthur, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (upholding jurisdiction over defendant served while flying over forum); Lee v. Baird, 139 Ala. 526, 528, 36 So. 720, 720 (1904) (upholding jurisdiction over defendant served while traveling through forum); Fisher, Brown & Co. v. Fielding, 67 Conn. 91, 104, 34 A. 714, 715 (1895) (upholding jurisdiction over defendant served while in forum on business unrelated to cause of action).

20. For an example of the harshness of the "transient rule," see *infra* notes 133-37 and accompanying text.

21. *See* Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957). For a discussion of these cases, see *infra* notes 31-39 and accompanying text.

22. *International Shoe*, 326 U.S. at 311-12.

23. *Id.* at 313-14.

24. *Id.* at 312.

Shoe Company, the notice of assessment was served on a salesman employed by that corporation in Washington and a copy of it was also delivered by registered mail to the corporation in St. Louis.[25] The Court found that the corporation's contacts with Washington were sufficient to render it amenable to a Washington court.[26]

Justice Stone's opinion did not express any doubt that presence remained a *sufficient* basis for the exercise of jurisdiction. Nevertheless, he offered a "minimum contacts" basis for jurisdiction consistent with due process.[27] The Court stated:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, *if he be not present within the territory of the forum*, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[28]

At first glance, it seems apparent that the Court was reinforcing the "transient rule."[29] However, its emphasis on "fair play and substantial justice,"

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25. *Id.*

26. *Id.* at 314-20. Further, a court always has jurisdiction to determine a jurisdictional issue. In Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982), the United States Supreme Court stated that jurisdictional restrictions are a function of due process, which acts to protect individual liberty. *Id.* at 702 n.10. Justice White, writing the majority opinion, explained that the constitutional requirement of personal jurisdiction is a right that protects the individual. If it were otherwise, he reasoned, a court could not stop a defendant from waiving or asserting the requirement. *Id.* at 704.

27. *International Shoe*, 326 U.S. at 316. The Court gave four factors in its "minimum contacts" analysis: (1) A defendant is subject to jurisdiction in a forum in which he has had continuous and systematic contacts which give rise to the particular litigation involved; (2) The single act or sporadic acts of the defendant are not sufficient to give jurisdiction over acts unrelated to those acts; (3) The continuous acts of the defendant may be so substantial to subject the defendant to jurisdiction on any cause of action; and (4) Sporadic acts, or even a single act of the defendant, are sufficient to give jurisdiction for claims arising out of that act or acts if they are of a certain nature or quality. *Id.* at 317-18. The second factor clearly states that a single act is not sufficient to grant jurisdiction over claims unrelated to that act. *Id.*

28. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)) (emphasis added). Although the inference is apparent, the statement does not positively assert that there would be jurisdiction wherever a defendant was present and served.

29. The Court in Shaffer v. Heitner stated that:

> [A]lthough the theory that territorial power is *both* essential to and *sufficient* for jurisdiction has been undermined, we have never held that the presence of property [or the presence of and service upon an individual defendant] in a State does not automatically confer jurisdiction over the owner's interest in that property.

433 U.S. 186, 211 (citations omitted) (emphasis added). For a discussion of the impact of Shaffer v. Heitner on the "transient rule" of personal jurisdiction, see *infra* notes 40-46 and accompanying text.

and its refusal to solely use the traditional physical power concept, indicate that the Court had begun to erode the "transient rule."[30]

Twelve years later in *McGee v. International Life Insurance Co.*,[31] the Supreme Court again addressed the issue of transient jurisdiction. In *McGee*, the Court acknowledged that California had an interest in providing its residents with effective means of redress.[32] It went on to hold that the California court's assertion of jurisdiction did not violate due process.[33]

Less than one year after *McGee*, the Court continued to erode the "transient rule" when it decided *Hanson v. Denckla*.[34] In *Hanson*, a domiciliary of Pennsylvania established a trust in Delaware with a Delaware trustee.[35] She later became domiciled in Florida, where she died.[36] In an action regarding the trust assets after her death, a Florida court found that service by mail upon the Delaware trustee was sufficient to grant in personam jurisdiction because "minimum contacts" existed between the State of Florida and the trustee.[37] The United States Supreme Court held that the Florida court did not have jurisdiction over the trustee.[38]

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30. The Court in *International Shoe* adopted a "reasonableness test" to decide if it would be "fair" to subject the defendant to suit in the forum state. 326 U.S. at 316-17.

31. 355 U.S. 220 (1957).

32. *Id.* at 223.

33. *Id.* at 223-24. One court has suggested that in personam jurisdiction over an out-of-state defendant upheld in *McGee* may no longer be valid under *Shaffer*. *See* Smith v. Lloyd's of London, 568 F.2d 1115 (5th Cir. 1978). The *Smith* court stated that, as a result of *Shaffer*, "the Supreme Court suggested that the liberal construction placed on the words 'traditional notions of fair play' in a due process context may be evolving into a more conservative one requiring, perhaps, even more contacts than those present in *McGee*." *Id.* at 1118 n.7.

In *McGee*, the plaintiff filed suit in California to recover on an insurance contract against a company which never had an office or agent in California. *McGee*, 355 U.S. at 221-22. Except for the single policy in question, the company had not conducted any business in California. *Id.* at 222. The Court, however, found a "substantial connection" between the contract of insurance and the forum state for the following reasons: 1) the solicitation to reinsure had been mailed to the insured in California; 2) the contract was delivered there; 3) the premiums were mailed from that state; and 4) the insured was a resident of California when he died. *Id.* at 221, 223. The Court added that the inconvenience to the defendant did not amount to a denial of due process. *Id.* at 224.

34. 357 U.S. 235 (1958). The *Hanson* decision came out only months after *McGee*.

35. *Id.* at 238.

36. *Id.* at 239.

37. *Id.* at 241-43.

38. *Id.* at 251-52. The United States Supreme Court distinguished *McGee* by indicating that: (1) the trust in *Hanson* had no relation to the forum state at the time it was executed, which was not true with regard to the insurance policy in *McGee*; and (2) the "bits of trust administration" carried on by the settlor after she became domiciled in Florida did not bear upon the validity of the trust agreement, whereas in *McGee*, the insurance policy would not have existed but for the solicitation to reinsure which the insurance company had sent to the insured in California. *Id.*

The *Hanson* Court further indicated the importance of the *International Shoe* "minimum contacts" analysis by holding that "minimum contacts" cannot be found to exist unless "there be some act by which the defendant *purposefully* avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[39] Thus, the Court undercut the power concept by emphasizing "fairness," which again questions the validity of the "transient rule."

B. The Shaffer Decision

Despite these erosions of the "transient rule," service of process in the forum was not seriously questioned as a means of obtaining jurisdiction until *Shaffer v. Heitner*.[40] The action in *Shaffer* was brought in a Delaware state court against a nonresident. Quasi in rem jurisdiction was asserted on the basis of the sequestration of defendants' shares in a Delaware Corporation that, by statute, had their situs in Delaware.[41] The state courts allowed the action to proceed over the defendants' motions to quash, but the Supreme Court reversed on fourteenth amendment due process grounds.[42] The Court held that *International Shoe* and its progeny should extend to in personam jurisdiction over out-of-state defendants as well as quasi in rem and in rem jurisdiction.[43] Commentators began to interpret *Shaffer's* extension of "minimum contacts" to all bases of jurisdiction as an end to the "transient rule."[44] These individuals relied on critical language in Justice Marshall's opinion which stated that "*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[45]

The *Shaffer* decision continued to erode the "transient rule" and thus set the stage for its abolishment. Although the United States Supreme Court has not specifically overruled the concept of transient jurisdiction, some post-*Shaffer* cases indicate that the concept of transient jurisdiction is

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39. *Id.* at 253 (citing *International Shoe Co.*, 326 U.S. at 319 (1945)) (emphasis added).

40. 433 U.S. 186 (1977).

41. *Id.* at 186-87. Quasi in rem jurisdiction has been recognized since *Pennoyer* as the theory under which the Court exercises jurisdiction over property within the state and therefore subject to state power. This procedure indirectly affects the interests of the absent owner.

42. *Id.* at 213-17.

43. *Id.* at 212.

44. *See, e.g.*, Bernstine, *supra* note 6, at 61; Brilmayer, *supra* note 6, at 755; Posnak, *supra* note 3, at 744; *see also* 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1067, at 251-53. *But see* Glen, *supra* note 6, at 611-12.

45. *Shaffer*, 433 U.S. at 212 (emphasis added) (footnote omitted).

outdated.[46] One such case is *Kulko v. Superior Court of California*.[47] In a discussion unnecessary to the central issue, the Court used language which indicates a further intrusion upon the concept of transient jurisdiction.[48] The Court stated that "[t]he existence of personal jurisdiction . . . depends upon the presence of reasonable notice to the defendant that an action has been brought and a sufficient connection between the defendant and forum State to make it *fair* to require a defense of the action in the forum."[49]

C. *Post-Shaffer Decisions*

Schreiber v. Allis-Chalmers Corp.,[50] was the first lower court decision to reject the "transient rule." In *Schreiber*, a Kansas resident brought an action in Mississippi against a Delaware corporation having its principle place of business in Wisconsin. The suit was based on an action which occurred in Kansas.[51] The business that the defendant conducted in Mississippi was unrelated to the source of the plaintiff's claim.[52] Nevertheless, personal jurisdiction was obtained over the defendant on the theory that the corporation was "present" in the jurisdiction because it was licensed to do business in the state.[53] The case was then transferred to the district court of Kansas

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46. *See* Energy Reserves Group, Inc. v. Superior Oil Co., 460 F. Supp. 483 (D. Kan. 1978) (dictum); Schreiber v. Allis-Chalmers Corp., 448 F. Supp. 1079 (D. Kan. 1978) (alternative holding), *rev'd*, 611 F.2d 790 (10th Cir. 1979). For a discussion of *Energy Reserves* and *Schreiber*, see *infra* notes 50-68 and accompanying text.

47. 436 U.S. 84 (1978). In *Kulko*, a New York domiciliary challenged the exercise of in personam jurisdiction by a California forum. The defendant's former wife, a resident of California, brought an action there to establish a Haitian divorce decree as a California judgment and to modify the judgment. *Id.* at 87-88. The California Supreme Court upheld jurisdiction based on the defendant's "purposeful act" of consenting to his daughter's living in California and purchasing a plane ticket to send her there. *Id.* at 94. The United States Supreme Court reversed and held that a forum's interest in protecting resident children and facilitating child support actions on their behalf was insufficient to make California a " 'fair forum' in which to require [defendant], who derives no personal or commercial benefit from his child's presence in California and who lacks any other relevant contact with the State, either to defend a child support suit or to suffer liability by default." *Id.* at 100-01 (citation omitted).

48. *Id.* at 91.

49. *Id.* (emphasis added) (citations omitted).

50. 448 F. Supp. 1079 (D. Kan. 1978).

51. *Id.* at 1081. The plaintiff chose to file suit in Mississippi because it had a longer statute of limitations period than Kansas. *Id.* The action was filed in Mississippi six days before the six-year Mississippi statute of limitations would have run. *Id.* The claim would have been barred by the Kansas statute of limitations. *Id.*

52. *Id.* at 1085. The source of the plaintiff's claim was that the business conducted by Allis-Chalmers in Mississippi was unrelated to its manufacture of farm machinery. *Id.*

53. *Id.* at 1085-86. Irrespective of whether the events occurred in Mississippi, Mississippi law provides for service upon any corporation found doing business in Mississippi. *Id.*; *see also* MISS. CODE ANN. § 79-1-27, 29 (1972).

which applied Mississippi law.[54] The defendant, however, successfully challenged the jurisdiction of the Mississippi court.[55]

The defendant claimed that if Mississippi could not assert personal jurisdiction, then the state certainly could not apply its statute of limitations to the plaintiff's claim.[56] Further, the defendant argued that even if jurisdiction could have been properly assured by Mississippi, that because of its conflict of laws principles, Mississippi would have applied the shorter Kansas statute of limitations while dismissing the action.[57]

The *Schreiber* court relied on the "minimum contacts" standard of *International Shoe* to find that the corporation was not "present" in the jurisdiction for purposes of service.[58] The court stated that "[t]here can be no question that a 'power' theory of jurisdiction, relying on outmoded notions of 'presence' or 'consent,' has no place in a discussion of power to effect personal jurisdiction over a non-resident *individual* who did not act and caused no injury within the forum state."[59] The *Schreiber* court further explained that:

> After *Shaffer*, plaintiff cannot rely solely on the asserted fact of 'presence' to sustain an exercise of jurisdiction in Mississippi, for 'physical presence is no longer either necessary *or sufficient* for in personam actions.' Rather, the nature and quality of that 'presence' must be evaluated, with an eye toward the interest of Mississippi in assuming jurisdiction and providing a forum for this particular action.[60]

This language indicates that the court might have been willing to find that transient presence was no longer a sufficient basis for the exercise of in personam jurisdiction over individuals, even though the case concerned corpo-

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54. *Schreiber*, 448 F. Supp. at 1082. The defendant successfully argued that the transfer must be done for the convenience of the parties and witnesses. *See* 28 U.S.C. § 1404(a) (1976).

55. *Schreiber*, 448 F. Supp. at 1082. The defendant argued that the plaintiff's claim was barred by the Kansas statute of limitations. *Id.* The defendant stated that since the Mississippi court lacked personal jurisdiction over the defendant, the Kansas court must apply its own statute of limitations. *Id.*

56. *Id.*

57. *Id.*; *see also* KAN. STAT. ANN. §§ 60-513, 84-2-725.

58. *Schreiber*, 448 F. Supp. at 1090-91. The court further declared that *Shaffer* requires that "any assumption of jurisdiction must meet the 'contacts' test of *International Shoe*." *Id.* at 1089.

59. *Id.* at 1087 (dictum) (emphasis supplied by the court).

60. *Id.* at 1089 (quoting Casad, Shaffer v. Heitner *An End to Ambivalence in Jurisdiction Theory?*, 26 KAN. L. REV. 61, 77 (1977)) (citation omitted) (emphasis supplied by the court).

rate presence.[61] However, at least one commentator has suggested that the *Schreiber* case should not be extended beyond its facts.[62]

Energy Reserves Group, Inc. v. Superior Oil Co.[63] was the next lower court decision to show disfavor towards the concept of transient jurisdiction. In *Energy Reserves*, a cause of action was brought against two corporations; one doing business in Kansas, the other a Nevada subsidiary which did not do business in Kansas.[64] Although the court could have found the subsidiary amenable[65] in Kansas simply because of its transient presence, the court instead applied the standard of *International Shoe* to uphold the assertion of in personam jurisdiction over the nonresident subsidiary.[66] The court used *Schreiber* as authority for the proposition that transient presence is no longer a sufficient basis to support the exercise of in personam jurisdiction.[67] Therefore, the *Energy Reserves* court stated, that "presence is . . . neither necessary nor always sufficient as a basis to support the exercise of jurisdiction."[68]

1. The *Blacketer* Decision: The "Transient Rule" Affirmed

One of the first post-*Shaffer* cases to decide whether an individual is still subject to the "transient rule" was *Oxmans' Erwin Meat Co. v. Blacketer*.[69] In *Blacketer*, the plaintiff corporation sued to recover the amount of a debt

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61. *See* Bernstine, *supra* note 6, at 56. Corporations are not necessarily subject to jurisdiction simply because an agent was sued while in the forum on corporate business. *See* R. LEFLAR, AMERICAN CONFLICTS LAW 50 (3d ed. 1977). Although no explanation for this disparate treatment between corporate and individual defendants is suggested in the case law, "a possible explanation . . . is that generally it is more difficult for the plaintiff to bring an individual into court than a corporation." Posnak, *supra* note 3, at 731 n.9. Nevertheless, it seems inconsistent to subject individual defendants to jurisdiction based on service of process within the forum state when individual agents of corporations, who are served, are not subjecting their corporations to such suits.

62. Bernstine, *supra* note 6, at 56-57. Bernstine based his opinion on three major points: (1) That the case included corporate rather than individual presence; (2) After holding that the Mississippi court could not assert jurisdiction over the case without violating due process rights, the court went on to consider the defendant's alternative conflict of laws argument — an action which undermines the court's assertion that its jurisdictional holding "commands dismissal of the case in accordance with [the] defendant's motion;" and (3) The court had a bias against the plaintiff's attorney. *Id.*

63. 460 F. Supp. 483 (D. Kan. 1978).

64. *Id.* at 491.

65. Amenability is a term that can be used interchangeably with in personam jurisdiction and is defined as "[s]ubject to answer to the law." BLACK'S LAW DICTIONARY 74 (5th ed. 1979).

66. *Energy Reserves*, 460 F. Supp. at 515.

67. *Id.* at 504; *see also* Warren v. Honda Motor Co., 669 F. Supp. 363, 369 (D. Utah 1987).

68. *Id.*

69. 86 Wis. 2d 683, 273 N.W.2d 285 (1979); *see also* MacLeod v. MacLeod, 383 A.2d 39 (Me. 1978).

owed to it by an Oklahoma corporation.[70] The plaintiff also sued Blacketer, an officer of the Oklahoma corporation, hoping to recover for the individual defendant's fraudulent misrepresentation that he was personally liable as a partner.[71] Blacketer, a nonresident of Wisconsin,[72] was served while he was physically present in that state.[73] The defendant agent cited *International Shoe* as authority for the proposition that an individual must have certain "minimum contacts" with the forum state to be subject to the jurisdiction of that state.[74] The defendant further alleged that mere physical presence was no longer sufficient to grant personal jurisdiction.[75]

The *Blacketer* court, however, refused to accept the defendant's contentions. The court instead stated that "[p]hysical presence is the traditional basis of judicial jurisdiction."[76] Justice Abrahamson, writing the majority opinion for the Wisconsin Supreme Court, continued:

> In our view the United States Supreme Court has not imposed a "minimum contacts" requirement on a state's assertion of jurisdiction over a natural person upon whom personal service within the state has been achieved. Neither *International Shoe* nor its progeny, including the recent case of *Shaffer v. Heitner* . . . addresses the issue of the constitutionality of the state's exercising jurisdiction based solely on the service of process upon an individual physically present within state borders.[77]

In reaching this conclusion, the *Blacketer* court only relied upon three sources.[78] First, the court cited two pre-*Shaffer* cases that upheld transient jurisdiction and rejected any attack on the "transient rule" based on *International Shoe*.[79] It then quoted extensively from a comment on *Shaffer* that appears in a tentative draft of the Restatement (Second) of Judgments.[80]

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70. *Blacketer*, 86 Wis. 2d at 686, 273 N.W.2d at 286.

71. *Id.* at 692-93, 273 N.W.2d at 289-90.

72. It is implicit in the opinion that he was not a domiciliary or resident of Wisconsin. *Id.* at 689-92, 273 N.W.2d at 287-89.

73. *Id.* at 686, 273 N.W.2d at 286.

74. *Id.* at 687, 273 N.W.2d at 287 (citing *International Shoe*, 326 U.S. at 316).

75. *Id.*

76. *Id.* at 687, 273 N.W.2d at 286. The *Blacketer* court looked to subsection 801.05(1)(a) of the Wisconsin Statutes which provides that a court has jurisdiction over a "defendant who when the action is commenced is a natural person present within this state when served." *Id.* The court went on to indicate that Professor Foster of the University of Wisconsin Law School has characterized transient jurisdiction as "solidly established." *Id.* at 687.

77. *Id.* at 687-88, 273 N.W.2d at 287 (footnote omitted).

78. *Id.*

79. *Id.* at 687 n.3, 273 N.W.2d at 287 n.3. The *Blacketer* court cited Donald Manter Co. v. Davis, 543 F.2d 419 (1st Cir. 1976) and Nielsen v. Braland, 264 Minn. 481, 119 N.W.2d 737 (1963). *Id.*

80. *See Blacketer*, 86 Wis. 2d at 688 n.4, 273 N.W.2d at 287 n.4. The court states:

Nevertheless, the *Blacketer* court went on to apply the "minimum contacts" test of *International Shoe*[81] and concluded that it was "reasonable, just and consistent with traditional notions of fair play" to subject the individual defendant to suit in Wisconsin.[82]

On its face, it appears the *Blacketer* decision reinforced the "transient rule." An argument, however, can be made to the contrary. Justice Abrahamson proceeded to fully analyze the defendant's contacts with the state. The court concluded that the defendant's contacts satisfied both standards. Thus, the *Blacketer* court seemed compelled to look for an alternative basis to find in personam jurisdiction, without relying solely on the defendant's transient presence.

2. Post-*Shaffer* Decisions Agreeing With *Blacketer*

The decision in *Blacketer* set the stage for a series of other opinions upholding in personam jurisdiction based on the transient presence of nonresident defendants in the forum state.[83] One such recent holding was ar-

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> In light of [Shaffer], it may well be doubted whether . . . defendant's "presence in the state, even for an instant, gives the state judicial jurisdiction over him," in the absence of some connection between the state and the transaction or the parties involved in the litigation. *Shaffer v. Heitner* seems to undercut that proposition, but the effect on territorial jurisdiction is modest. Given the doctrine of forum non conveniens, few if any states would exercise jurisdiction in such circumstances. As a theoretical matter, however, the effect of *Shaffer v. Heitner* is considerable. It would establish "minimum contacts" in place of presence as the principle basis for territorial jurisdiction.

Id. (citing RESTATEMENT (SECOND) OF JUDGMENTS § 8, comment a, at 63-64 (Tent. Draft No. 5, 1978) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28, comment a (1971))). *Id.* (citation omitted).

81. *Blacketer*, 86 Wis. 2d at 688, 273 N.W.2d at 287.

82. *Id.* at 693, 273 N.W.2d at 289. The *Blacketer* court relied on the facts found by the trial court to demonstrate the presence of sufficient contacts, which included the following: (1) The individual defendant started doing business with the plaintiff in order to supply a new restaurant being opened in Milwaukee, Wisconsin; (2) Forty-four of fifty business meetings between the parties were held in the individual defendant's offices in Milwaukee; and (3) The cause of action arose out of a meeting held in Milwaukee at which the individual defendant allegedly misrepresented that he would be personally liable on the debt as a general partner. *Id.* at 689-90, 273 N.W.2d at 288.

83. Most courts claim that jurisdiction based on physical presence remains alive and well. *See, e.g.*, Amusement Equip. Inc. v. Mordelt, 779 F.2d 264 (5th Cir. 1985); Driver v. Helms, 577 F.2d 147 (1st Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); Opert v. Schmid, 535 F. Supp. 591 (S.D.N.Y. 1982); Ruggieri v. General Well Serv., Inc., 535 F. Supp. 525, 529 (D. Colo. 1982) (dictum); O'Brien v. Eubanks, 701 P.2d 614, 616 (Colo. Ct. App. 1984), *cert. denied*, 474 U.S. 904 (1985); Hutto v. Plagens, 254 Ga. 512, 513, 330 S.E.2d 341, 343 (1985); Gant v. Gant, 254 Ga. 239, 242, 327 S.E.2d 723, 725 (1985); Humphrey v. Langford, 246 Ga. 732, 733-34, 273 S.E.2d 22, 23-24 (1980); In re Marriage of Pridemore, 146 Ill. App. 3d 990, 100 Ill. Dec. 640, 497 N.E.2d 818 (1986); Swarts v. Dean, 13 Kan. App. 2d 228, 766 P.2d 1291 (Ct. App. 1989); *MacLeod*, 383 A.2d 39; Cariaga v. Eighth Judicial District Court, 104 Nev. 82, 762 P.2d 886 (1988); El-Maksoud v.

ticulated by the Supreme Court of North Carolina in *Lockert v. Breedlove*.[84] In *Lockert*, a nonresident defendant was served with process while present in North Carolina. Rejecting the defendant's claim that dismissal for lack of "minimum contacts" was appropriate, the *Lockert* court reasoned that the "minimum contacts" test of due process, as set forth in *International Shoe* and later cases, is inapplicable where the defendant is served in the forum state:

> The *Pennoyer* Court recognized, *inter alia*, what came to be known as the transient rule of jurisdiction whereby mere service of process upon a nonresident present in the forum state was sufficient to establish personal jurisdiction. . . . We conclude . . . that a close reading of *International Shoe* and later cases reveals that the Supreme Court has not abolished the transient rule of jurisdiction. . . . [R]ather, it set out an alternative means of establishing personal jurisdiction when the defendant is 'not present within the territory of the forum.' . . . For the foregoing reasons, we hold that the rule continues to be that personal service on a nonresident party, at a time when that party is present in the forum state, suffices in and of itself to confer personal jurisdiction over that party.[85]

Later cases in the North Carolina Court of Appeals used *Lockert* as their authority for the same holding.[86]

Another recent case, *Nutri-West v. Gibson*,[87] ruled that the "transient rule" is alive and well. In *Nutri-West*, the plaintiff agreed to enter a chiropractic machine distributorship with the defendants.[88] Three years later, the plaintiff became unhappy with the defendants' performance and filed an action for declaratory judgment and an injunction terminating the distributorship agreement.[89] When one of the defendants entered Wyoming (the forum state) to attend a meeting, the plaintiff served her with process.[90] The *Nutri-West* court relied on *Amusement Equipment v. Mordelt*,[91] and

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El-Maksoud, 237 N.J. Super. 483, 568 A.2d 140 (1989); Morris v. Morris, 371 S.E.2d 756 (N.C. App. 1988); Jenkins v. Jenkins, 89 N.C. App. 705, 367 S.E.2d 4 (1988); Lockert v. Breedlove, 321 N.C. 66, 361 S.E.2d 581 (1987); Mannio v. Davenport, 99 Wis. 2d 602, 299 N.W.2d 823, 826 (1981) (dictum); *Blacketer*, 86 Wis. 2d at 688, 273 N.W.2d at 287 (1979) (dictum); Nutri-West v. Gibson, 764 P.2d 693 (Wyo. 1988). For a discussion of *Lockert* and *Nutri-West*, see *infra* notes 84-96 and accompanying text. For a discussion of *El-Maksoud*, see *infra* notes 98-100 and accompanying text.

84. 321 N.C. 66, 361 S.E.2d 581 (1987).
85. *Id.* at 69-72, 361 S.E.2d at 583-85 (citation omitted).
86. *See Morris*, 371 S.E.2d at 758; *Jenkins*, 89 N.C. App. at 707, 367 S.E.2d at 5.
87. 764 P.2d 693 (Wyo. 1988).
88. *Id.* at 694.
89. *Id.*
90. *Id.*
91. 779 F.2d 264 (5th Cir. 1985).

indicated that personal service upon a nonresident defendant in the forum state is sufficient to subject the defendant to in personam jurisdiction.[92] The court stated that "[j]urisdiction based upon personal service within the forum state is a concept that is historically entrenched, universally recognized, very predictable, and easy to apply. One cannot claim unfair surprise when he enters a state and is subjected to the jurisdiction of that state's courts."[93]

Although the court indicated that the "minimum contacts" analysis from *International Shoe* was inapplicable, Chief Justice Cardine nonetheless stated that the exercise of in personam jurisdiction must also satisfy due process.[94] Even though Justice Cardine detected no unfairness or injustice in the exercise of personal jurisdiction based upon an individual's presence within a state,[95] he did indicate that "we are unwilling to reject this established jurisdictional principle *without direction from a higher authority*."[96] Thus, the court may have welcomed some authority to the contrary.

Recent decisions in other jurisdictions have agreed with *Nutri-West*.[97] In *El-Maksoud v. El-Maksoud*,[98] the Superior Court of New Jersey indicated that *Nutri-West* was correct in its analysis. The court indicated that "it is constitutionally permissive to predicate personal jurisdiction on temporary physical presence and personal service within the forum state."[99] Agreeing with *Nutri-West* that the "transient rule" should not be rejected "without direction from a higher authority," the court went on to indicate that "[a]ny unfairness to the defendant can be addressed by application of the doctrine of *forum non conveniens*."[100] Nevertheless, this author will indicate that the doctrine of *forum non conveniens* has severe limitations.[101]

3. Post-*Shaffer* Decisions Refusing to Follow the "Transient Rule"

Since the decision in *Blacketer*, some courts have held that in personam jurisdiction based solely upon the transient presence of the defendant in the

92. *Nutri-West*, 764 P.2d at 695-96.

93. *Id.* at 696.

94. *Id.* at 695.

95. *Id.* at 696.

96. *Id.* (citing *Opert*, 535 F. Supp. at 594 (S.D.N.Y. 1982)) (emphasis added).

97. *See, e.g.*, *Swarts*, 13 Kan. App. 2d 228, 766 P.2d 1291 (Ct. App. 1989); *Cariaga*, 104 Nev. 82, 762 P.2d 886; *El-Maksoud*, 237 N.J. Super. 483, 568 A.2d 140..

98. 237 N.J. Super. 483, 568 A.2d 140 (1989).

99. *Id.* at 488-89, 568 A.2d at 143 (quoting *Nutri-West*, 764 P.2d at 694).

100. *Id.* at 490, 568 A.2d at 144.

101. *See infra* notes 232-35 and accompanying text.

forum state is invalid.[102] A United States District Court, in *Harold M. Pitman Co. v. Typecraft Software Ltd.*,[103] held that the mere service of process upon a defendant, in accordance with *Shaffer*, does not vest a state with personal jurisdiction over the defendant. In *Pitman*, the officer, director and ninety percent shareholder of Typecraft Software was served with a summons and complaint while in the forum state for the first time on a three-day business trip.[104] The court indicated that personal service within the jurisdiction was not the proper test for in personam jurisdiction.[105] Rather, the court stated that the proper test was whether the defendant had "minimum contacts" with the forum so as to make it reasonable for the defendant to be subject to suit in the forum state.[106]

In *Nehemiah v. Athletics Congress of the U.S.A.*,[107] the United States Court of Appeals for the Third Circuit also held that a court could not obtain jurisdiction over an unincorporated association merely by service upon an agent transiently present within the state.[108] The *Nehemiah* court, relying on *Shaffer*, extended the application of the *International Shoe* "minimum contacts" requirement to unincorporated associations.[109]

Another recent pronouncement concerning the concept of transient jurisdiction was made by an Ohio appeals court. In *Lonigro v. Lonigro*,[110] Justice Wolff indicated that the "time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions in rem as well as in personam."[111] *Lonigro* involved a couple who were married for fourteen years and had four children while living in Richmond, Indiana.[112] When the couple finally separated in 1986, Lena Lonigro left Indiana and moved to Kettering, Ohio

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102. *See, e.g.*, Nehemiah v. Athletics Congress of the U.S.A., 765 F.2d 42, 46 (3d Cir. 1985); Waffenschmidt v. Mackay, 763 F.2d 711 (5th Cir. 1985), *cert. denied, sub. nom.* Waffenschmidt v. First Nat'l Bank of Mount Vernon, 474 U.S. 1056 (1986); Harold M. Pitman Co. v. Typecraft Software, Ltd., 626 F. Supp. 305 (N.D. Ill. 1986); Mohler v. Dorado Wings, Inc., 675 S.W.2d 404 (Ky. Ct. App. 1984); Lonigro v. Lonigro, No. 10780 (Ohio App. July 26, 1988) (LEXIS, States Library, Ohio File); Bershaw v. Sarbacher, 40 Wash. App. 653, 700 P.2d 347 (1985).

103. 626 F. Supp. 305 (N.D. Ill. 1986).

104. *Id.* at 307.

105. *Id.* at 312.

106. *Id.* For a discussion of the "reasonableness test" with regard to "minimum contacts" as developed by the United States Supreme Court in *International Shoe*, see *supra* notes 21-30 and accompanying text.

107. 765 F.2d 42 (3d Cir. 1985).

108. *Id.* at 47.

109. *Id.*

110. No. 10780 (Ohio App. July 26, 1988) (LEXIS, States Library, Ohio File).

111. *Id.* at 8.

112. *Id.* at 1-2.

with her minor child, Monica.[113] Aldo Lonigro never lived in Ohio, but did visit Lena on at least ten occasions. Approximately one year after their separation, Lena filed her complaint for divorce.[114] Aldo was personally served with the complaint at or near Lena's Kettering residence.[115]

The trial court ruled that personal service was not sufficient to confer jurisdiction.[116] Justice Wolff, writing the opinion for the court of appeals, stated "[w]e agree with the trial court that Due Process requires an analysis of minimum contacts under *International Shoe* . . . and its progeny."[117] The Justice went on to cite *Shaffer* with approval: " 'It is clear . . . that the law of state-court jurisdiction no longer stands securely on the foundation established in *Pennoyer*.'. . . We agree with the *Pitman* court's analysis, and conclude that transient presence is no longer a viable basis for the assertion of personal jurisdiction."[118] The court used a public policy argument to support its holding. It relied on *Shaffer* and the legal principle that a court may not sequester a defendant's property and assert in rem or quasi in rem jurisdiction unless there are "minimum contacts" between the defendant, the litigation and the forum.[119] The court indicated that *Shaffer* was not meant to result in the illogical and unfair result of affording less protection to an individual defendant than to his or her property within the state.[120]

III. THE "TRANSIENT RULE": ITS IMPACT ON SOCIETY

The "transient rule" has been viewed as a straightforward, simple and welcome characteristic in due process litigation.[121] Upholding transient presence allows a state court to ignore the complicated balancing required by the *International Shoe* "minimum contacts" test.[122] The rule, however, has also been characterized as overly broad.[123] It is therefore important for courts to choose between a clear, simple, yet overly broad rule, or use a rule that may be a violation of a defendant's due process rights. Some commentators have stated that they believe the concept of transient jurisdiction

113. *Id.*
114. *Id.* at 2.
115. *Id.*
116. *Id.*
117. *Id.* at 6.
118. *Id.* at 8, 12 (citing *Shaffer*, 433 U.S. at 206).
119. *Id.* at 7-12.
120. *Id.* at 10-11.
121. *See* Brilmayer, *supra* note 6, at 755.
122. *Id.* For a discussion of the "minimum contacts" test from *International Shoe*, see *supra* notes 27-30 and accompanying text.
123. *See, e.g.*, WIS. STAT. § 801.05(1) (1987-88):

should be abolished.[124] This author adheres to that view and finds support for it when looking at the "transient rule's" impact on defendants' rights to travel,[125] defendants' immunity from service,[126] and venue problems.[127]

A. The Right to Travel

The "transient rule" has indirectly affected an individual's right to interstate travel. Attorneys who believe that their clients do not have "minimum contacts" with the forum state, should prudently advise them not to enter that state if they wish to avoid being subject to the state's jurisdiction through service of process. There is, however, a right to interstate travel grounded in the United States Constitution.

In *Shapiro v. Thompson*,[128] the United States Supreme Court indicated that "all citizens [should] be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."[129] The United States Supreme Court has consistently indicated that the right to travel is a basic right under the Constitution.[130] In *United States v. Guest*,[131] Justice Stewart articulated the fundamental nature of this right, stating:

> The constitutional right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. . . . The reason [the right] has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.[132]

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(1) LOCAL PRESENCE OR STATUS. In any action whether arising within or without this state, against a defendant who when the action is commenced:

(a) Is a natural person *present within this state when served*; or

(b) Is a natural person domiciled within this state; or

(c) Is a domestic corporation; or

(d) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

Id. (emphasis added).

124. *See, e.g.*, Bernstine, *supra* note 6, at 61; Brilmayer, *supra* note 6, at 752-55; Posnak, *supra* note 3, at 731-32.

125. *See infra* notes 128-37 and accompanying text.

126. *See infra* notes 138-69 and accompanying text.

127. *See infra* notes 170-80 and accompanying text.

128. 394 U.S. 618 (1969).

129. *Id.* at 629. Justice Brennan delivered the opinion of the court.

130. *See* United States v. Guest, 383 U.S. 745, 752-58 (1966).

131. 383 U.S. 745 (1966).

132. *Id.* at 757-58 (citation omitted).

The "transient rule" has unreasonably restricted this constitutional right to interstate travel.

For example, in *Grace v. MacArthur*,[133] service of process in an airplane flying over the forum state was the stated basis of asserting in personam jurisdiction over one of the defendants.[134] In *Grace*, citizens of Arkansas brought an action against a corporation, a citizen of Illinois, and a citizen of Tennessee, based on a contract made and executed in Illinois.[135] The Illinois resident was served in an airplane when the plane passed over Arkansas enroute from Memphis, Tennessee to Dallas, Texas.[136] The court held that such service constituted service within the territorial limits of Arkansas, and declined to grant the Illinois citizen's motion to quash service on the ground that he was never within the forum state.[137] *Grace* is precisely the type of situation that unreasonably restrains interstate travel. With the rapid increase in technology and the integral role air travel plays in contemporary society, more people fly each day with the fear of being served over the forum state.

B. Immunity From Service

The "transient rule" has been considered by many as a simple and straightforward rule that is favored by the litigation process.[138] Immunity from service when the defendant is in the state pursuant to process or subpoena served in other non-related litigation has, however, compelled the courts to decide many issues created by the application of the "transient rule."[139]

1. Immunity for Trial-Related Purposes

It has long been recognized that immunity from service of process should be granted to the defendant when the defendant is a party, witness, or attorney entering the state from another jurisdiction in order to attend court or to represent a party in connection with another lawsuit.[140] Courts have generally recognized that immunity should not be granted for the convenience of the person seeking it, but instead, should be conferred for the

133. 170 F. Supp. 442 (E.D. Ark. 1959).
134. *Id.* at 443.
135. *Id.* at 443, 447.
136. *Id.* at 443.
137. *Id.* at 447-48.
138. *See, e.g.*, Brilmayer, *supra* note 6, at 754-55.
139. The concept of immunity from service has become very amorphous and the grant of immunity varies from state to state. *See* 4 C. WRIGHT & A. MILLER, *supra* note 6, §§ 1076-81.
140. *Id.* at § 1076.

convenience of the court and made available only to further the administration of justice.[141]

Defendants who are parties to another lawsuit have generally been immune from service of process when present in the forum state. In *United States v. Krasnov*,[142] a federal district court held that the defendants were immune from service of process while present in the state as a party to another lawsuit.[143] The court stated that nonresident parties are generally exempt from service of process while in attendance at, traveling to, or returning from court.[144] In a more recent case, *Uniroyal, Inc. v. Sperberg*,[145] the court implied that a party who is in a jurisdiction for the purpose of answering interrogatories at his attorney's office is immune from service if his activities in the jurisdiction are so confined.[146]

The "transient rule" has also created a need for immunity when defendants enter the forum state as a witness in another trial.[147] In *Rimar v. McCowan*,[148] another federal district court concluded that a witness who was the defendant in a separate case was immune from service while in the jurisdiction for purposes of attending an unrelated court proceeding.[149] The court held no merit in the argument that an FBI agent, in the unrelated action when he was served, should be treated differently.[150] Although unsuccessful, the action in *Rimar* is only one example of the impact that the "transient rule" has on witnesses entering the forum state. Many other cir-

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141. This rationale was articulated in Stewart v. Ramsay, 242 U.S. 128 (1916), where the Court stated that "[i]t is founded in the necessities of the judicial administration, which would be often emphasized and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify." *Id.* at 130.

142. 109 F. Supp. 143 (E.D. Pa. 1952).

143. *Id.* at 148.

144. *Id.* at 147.

145. 63 F.R.D. 55 (S.D.N.Y. 1973). In *Uniroyal*, a party was served in New York while he was in that state for both business and social activities which were unrelated to his dealings with Uniroyal. *Id.* at 58. The court indicated that Sperberg could have consulted with his attorney with regard to the answering of interrogatories in any other state but instead chose New York. *Id.* The United States District Court therefore, held that since Sperberg did not confine his activities in New York to just the answering of interrogatories in his attorney's office, he was not immune from service of process. *Id.*

146. *Id.* at 58-9.

147. *See* 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1076.

148. 374 F. Supp. 1179 (E.D. Mich. 1974).

149. *Id.* at 1183.

150. *Id.* at 1182.

cumstances have evolved which have forced the courts to decide witness immunity issues.[151]

2. Immunity in Non-Trial Situations

The impact of the "transient rule" has also compelled judges to rule on immunity of service of process in non-trial situations. A person who is in a jurisdiction in order to give a deposition may claim immunity on the same basis as one who is there to attend a trial.[152] At least one court has further held that a defendant who enters a jurisdiction for settlement talks may not be served unless warned in advance by the plaintiff of the possibility of service of process.[153]

Courts have also been forced to apply immunity standards to cover those who are in the jurisdiction to appear at an administrative hearing or before a legislative committee.[154] Other immunity issues have compelled courts to make decisions with regard to the constitutional privilege granted

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151. *See, e.g.*, Moylan v. AMF Overseas Corp., 354 F.2d 825 (9th Cir. 1965) (nonresident defendant testifying in an action on behalf of his employer was exempt from service); Walker v. Calada Materials Co., 309 F.2d 74 (10th Cir. 1962) (nonresident officer of a corporation was not subject to jurisdiction when attending the trial of another case); Kollenborn v. Murphy, 118 F. Supp. 848 (N.D. Tex. 1954) (witnesses who entered jurisdiction to give testimony in divorce proceedings were not amenable to service of process when waiting to testify outside of the courtroom); Morse-Koob, Inc. v. Milner Export & Trading Co., 93 F. Supp. 344 (W.D. Okla. 1950) (corporation president attending a reorganization proceeding as a witness was immune from service of process on the corporation in another action).

152. *See, e.g.*, Beeber v. LaFrance, 360 F. Supp. 1030, 1032 (S.D.N.Y. 1973) (Massachusetts residents were immune from service of process while in New York for the taking of a deposition); Sherwin-Williams Co. v. American Chem. Paint Co., 67 F. Supp. 685 (D. Del. 1946) (nonresident defendant was immune while in the forum state taking a deposition in another case).

153. K Mart Corp. v. Gen-Star Indus. Co., 110 F.R.D. 310 (E.D. Mich. 1986). The court in *K Mart* stated that service of process on a defendant not normally present in the jurisdiction who has entered for settlement talks is prohibited unless:

> [T]he plaintiff *warns* the defendant before he enters the jurisdiction that he may subject himself to process, or else when settlement talks fail the plaintiff must give the defendant *an opportunity to leave the jurisdiction* before service is made. Such a rule avoids inherently difficult determinations as to who initiated meetings, who relied on statements made by whom, and whether the plaintiff engaged in good faith settlement. Such a bright-line rule promotes good faith settlement, is efficient from a judicial standpoint, and serves to distance the courts from the possibility of trickery.

Id. at 313 (emphasis in original).

154. *See, e.g.*, Pavlo v. James, 437 F. Supp. 125 (S.D.N.Y. 1977) (nonresident defendant in forum state as a witness in a arbitration proceeding); Youpe v. Strasser, 113 F. Supp. 289 (D.C. 1953) (holding that immunity of nonresident witnesses from service of process applies to witnesses before bodies of legislative branch of government); Sullivan v. Kilgore Mfg., 100 F. Supp. 983 (E.D.N.Y. 1951) (indicating that defendant was immune from service when in forum state to attend hearings conducted by the United States Coast Guard); Stratton v. Hughes, 211 F. 557 (D.N.J. 1914) (nonresident in forum state for a proceeding before the motor vehicle commission).

to senators and representatives from arrest,[155] government employee immunity while on official business,[156] and diplomatic immunity.[157]

3. Immunity for Enticement into the Jurisdiction

Courts have generally ruled that in personam jurisdiction cannot be obtained over an otherwise non-amenable defendant through the "transient rule" when the individual was in some manner enticed[158] into entering the jurisdiction. The immunity is granted to a party who is induced to come into the jurisdiction either by the plaintiff, or the plaintiff's attorney.[159] As early as 1917, the courts of the United States began eroding the "transient rule's" harsh impact through standards of immunity from entitlement.[160]

In *Blandin v. Ostrander*,[161] the Second Circuit Court of Appeals indicated that jurisdiction over the defendant based on transient presence cannot occur if the defendant was fraudulently induced by the plaintiff, or plaintiff's attorney, into entering the forum state.[162] The court stated that:

> [a] party found within the jurisdiction may, of course, be there served; "but it cannot be said that he was so found there, if he was . . . enticed into the district for the purpose of making . . . service upon him, by false representations and deceitful contrivances of the plaintiff in the suit, or by anyone acting in his behalf."[163]

Many post-*Blandin* decisions have also offered this protection to defendants who have been tricked into entering the forum state. One such decision was *Wyman v. Newhouse*,[164] where the plaintiff fraudulently induced the defendant into entering the forum state by phoning and sending telegrams which stated the plaintiff's desperate need to see the defendant.[165]

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155. U.S. CONST., Art. I, § 6. This privilege has been interpreted as not applying to service of civil process. *See* Long v. Ansell, 293 U.S. 76 (1934).

156. *See* United States v. Kirby, 74 U.S. 482 (1868), where the Court said that governmental employees and agents are not immune from service of process, although they may be immune from arrest on civil process while on official business. *Id.* at 486.

157. Diplomatic immunity extends to all process including ordinary civil process. *See* Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965).

158. The term "entice" means to attract by arousing hope or desire; lure. AMERICAN HERITAGE DICTIONARY 456 (2d ed. 1982). For purposes of this Comment it also includes trickery, coercion, intimidation, and inducement.

159. *See* 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1076, at 502-04 n.11.

160. *See* Blandin v. Ostrander, 239 F. 700 (2d Cir. 1917).

161. 239 F. 700 (2d Cir. 1917).

162. *Id.* at 703.

163. *Id.* at 702.

164. 93 F.2d 313 (2d Cir. 1937), *cert. denied*, 303 U.S. 664 (1938).

165. *Id.* at 314. In *Wyman*, the defendant was a resident of New York and never lived in Florida. *Id.* While in Salt Lake City, Utah, he received a telegram from the plaintiff which read: "Account illness home planning leaving. Please come on way back. Must see you." *Id.* The

The Second Circuit held that a "fraud affecting the jurisdiction is equivalent to a lack of jurisdiction."[166] Other cases have since applied the same holding.[167]

In *Jacobs/Kahan & Co. v. Marsh*,[168] the Seventh Circuit indicated that jurisdiction over a nonresident defendant may not be premised on his physical presence when that presence was obtained by plaintiff's trickery or designed solely to create a jurisdictional predicate.[169] Many courts have thus tried to soften the harshness of the "transient rule" by granting immunity to defendant's who were fraudulently induced into the forum state by plaintiffs.

C. *Impact of Forum Non Conveniens on Transient Jurisdiction*

The "transient rule" has also compelled many courts to interpret and apply the common law development of forum non conveniens.[170] The doctrine of forum non conveniens is patterned after the right of a court, in the exercise of its powers, to refuse the imposition upon its jurisdiction the trial

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defendant further received another letter stating that the plaintiff had to see him one more time. This letter was followed by a telephone call from the plaintiff who repeated, in a hysterical and distressed voice, the substance of her letter. The defendant then flew to Florida because of the plaintiff's comments and was served with process while present in the state. *Id.* The Circuit Court of Appeals for the Second Circuit held that the defendant was fraudulently induced into entering Florida and was immune from service. *Id.* at 315.

166. *Id.*

167. *See, e.g.*, Buchanan v. Wilson, 254 F.2d 849 (6th Cir. 1958) (plaintiffs enticed garageman to bring car to their home); Century Brick Corp. v. Bennett, 235 F. Supp. 455 (W.D. Pa. 1964) (service held invalid when defendant was enticed into the state on the belief that he would be given new job assignments); Oliver v. Cruson, 153 F. Supp. 74 (D. Mont. 1957) (service was held to be invalid when the defendant was fraudulently lured into the jurisdiction for a settlement conference); Coyne v. Grupo Industrial Trieme, 105 F.R.D. 627 (D.D.C. 1985) (plaintiff fraudulently induced nonresident defendant to enter the forum state by asking for defendant to appear because of settlement negotiation); E/M Lubricants, Inc. v. Microfral, S.A.R.L. 91 F.R.D. 235 (D.C. Ill. 1981) (plaintiff fraudulently failed to notify defendant that he had decided that prelawsuit negotiation was no longer feasible); Sunshine Kitchens, Inc. v. Alanthus Corp., 65 F.R.D. 4 (S.D. Fla. 1974) (plaintiff only wanted to serve process on defendant rather than conduct negotiation in good faith); Willametz v. Susi, 54 F.R.D. 463 (D. Mass. 1972) (false representation by another made on plaintiff's behalf for purposes of enticing defendant into the jurisdiction resulted in an abuse of process).

168. 740 F.2d 587 (7th Cir. 1984).

169. *Id.* at 592 n.7.

170. The term "forum non conveniens" refers to the discretionary power of a court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if action were brought and tried in another forum. BLACK'S LAW DICTIONARY 589 (5th ed. 1979) (citing Johnson v. Spider Staging Corp., 87 Wash. 2d 577, 555 P.2d 997, 999, 1000 (1976)); *see also* 28 U.S.C. § 1404.

of cases even though the venue[171] is properly established. Forum non conveniens is proper if it appears that, for the convenience of the litigants, the witnesses, and in the interest of justice, the action should be instituted in another forum where the action might have been brought.[172] The application of the doctrine rests on the sound discretion of the court. The factors a court must consider include the private interests of the litigants, and the interest of the public.[173] Some commentators have argued that the harshness of the "transient rule" on a defendant may be mitigated by the doctrine of forum non conveniens.[174] Another has indicated that the doctrine does little to mitigate the harshness of the "transient rule."[175]

Nevertheless, the doctrine of forum non conveniens is discretionary, and rarely will a trial court be overruled for failure to grant the defendant's motion for dismissal based on forum non conveniens.[176] The doctrine also

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171. The term "venue" refers to the "particular county, or geographical area, in which a court with jurisdiction may hear and determine a case. Venue deals with locality of suit, that is, with question of which court, or courts, of those that possess adequate personal and subject matter jurisdiction may hear the specific suit in question." BLACK'S LAW DICTIONARY 1396 (5th ed. 1979).

172. Hayes v. Chicago, 79 F. Supp. 821, 824 (D. Minn. 1948). The doctrine also "presupposes at least two forums in which the defendant is amenable to process and furnishes criteria for choice between them." Wilson v. Seas Shipping Co., 78 F. Supp. 464, 465 (E.D. Pa. 1948) (citing with approval Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506 (1947)); Neal v. Pennsylvania R. Co., 77 F. Supp. 423, 424 (S.D.N.Y. 1948).

173. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). As the *Gulf Oil* Court stated:

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harrass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.

Id. at 508; *see also* Di Lella v. Lehigh Valley R. Co., 7 F.R.D. 192, 193 (S.D.N.Y. 1947).

174. *See* Bernstine, *supra* note 6, at 66; Posnak, *supra* note 3, at 759; *see also* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.13 at 628 n.7 (2d ed. 1970). *See generally* Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

175. *See* Brilmayer, *supra* note 6, at 754. For an examination of the reasons why the doctrine does not mitigate the harshness of the "transient rule," see *infra* notes 225-35 and accompanying text.

176. This is due in part to the large number of relevant factors (some of which may conflict), and the highly subjective nature of assigning weight to those factors. In addition, in those jurisdictions that adhere to the final decision rule, the issue may not be appealable until there has been a final decision on the merits. When this is the case, the appellate court may be reluctant to reverse on the grounds of forum non conveniens because reversal would necessitate a new trial; *see*

has severe limitations. It fails to ensure that a defendant will not have to defend wherever he is served regardless of the overall lack of connection with the forum.[177] Since the original forum is presumed to be convenient,[178] the burden is on the defendant to show that there is a more convenient forum available. In some states the doctrine has been rejected.[179] In at least one state the doctrine will not be applied if the plaintiff is a forum resident.[180] Regardless of its applicability as a safety valve, the doctrine of forum non conveniens has compelled courts to rule on such motions because of the harshness of the "transient rule."

IV. LONG-ARM STATUTES: HISTORY AND DEVELOPMENT

A. Long-Arm Statutes in General

The broadly written decision in *International Shoe Co. v. Washington* [181] led to the effort of many state legislatures to conform their statutory pattern to be consistent with the Constitution.[182] This type of legislation, called "long-arm" statutes, predicated jurisdiction over nonresidents. Such statutes indicate that personal jurisdiction is obtained over a nonresident if the individual commits any one of a series of enumerated acts within the jurisdiction, or commits a certain act outside the jurisdiction that has consequences within it. A nonresident corporation is amenable upon the doing of business in the forum state.[183] In general, jurisdiction based upon the activities described in these statutes is supported directly or inferentially by cases decided after *International Shoe*.[184]

In the majority of long-arm statutes, there are vestiges of the "presence" theory and the "power principle" of transient jurisdiction as expressed in *Pennoyer*.[185] State long-arm statutes, in essence, provide a litigation forum

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Gulf Oil, 330 U.S. at 512. The trial court had granted the motion and dismissed the suit. The Supreme Court reversed the appellate court, not the trial court. *Id.*

177. *See* Posnak, *supra* note 3, at 759.

178. *Gulf Oil*, 330 U.S. at 508.

179. *See* Comment, *Forum Non Conveniens, Injunctions Against Suit and Full Faith and Credit*, 29 U. CHI. L. REV. 740, 750 (1962).

180. Thomson v. Continental Ins. Co., 66 Cal. 2d 738, 427 P.2d 765, 59 Cal. Rptr. 101 (1967).

181. 326 U.S. 310 (1945). For a discussion of *International Shoe* see *supra* notes 21-30 and accompanying text.

182. *See* 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1068, at 334.

183. The "doing business" test is a predicate for a state's exercise of in personam jurisdiction over foreign corporations with respect to causes of action not related to the corporation's activities within the forum state. *See* Werner, *supra* note 6, at 575.

184. *See* 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1068, at 335.

185. For a discussion of the "presence" theory as originally developed in *Pennoyer*, see *supra* note 4.

for the convenience of a given state's own citizens at the expense of citizens of other states. Most commentators, however, have agreed that the statutory trend is a proper one due to today's mobile and highly technological society, which has effectively reduced the time and rigors of travel.[186] Thus, long-arm statutes are just one safety device through which the "transient rule" can be essentially eliminated.[187]

B. The History of Long-Arm Statutes

The first comprehensive long-arm statute was enacted in Illinois.[188] The statute has since been used as a model by a number of states.[189] It was designed to assert jurisdiction based on permissible constitutional limits.[190] Under the Illinois statute, a corporation or an individual is said to be sub-

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186. *See generally* Casad, *Long Arm and Convenient Forum*, 20 KAN. L. REV. 1 (1971); Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533; Foster, *Judicial Economy; Fairness and Convenience in Place of Trial: Long-Arm Jurisdiction in District Courts*, 47 F.R.D. 73 (1968); Rohr, *Personal Jurisdiction in Florida; Some Problems and Proposals*, 3 NOVA L.J. 365 (1981); Trautman, *Long-Arm and Quasi In Rem Jurisdiction in Washington*, 51 WASH. L. REV. 1 (1975); Comment, *Developments in the Law — State Court Jurisdiction*, 73 HARV. L. REV. 909, 1002-06, 1015-17 (1960); Note, *A Reconsideration of "Long-Arm" Jurisdiction*, 37 IND. L.J. 333 (1962); Comment, *Limited Jurisdiction in California: The Long-Arm of the Law Reaches Farther in Tort Than in Contract*, 17 SANTA CLARA L. REV. 919 (1977); Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300 (1970); Comment, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions*, 63 MICH. L. REV. 1028 (1965); *see also* Smithers, *Virginia's "Long-Arm" Statute: An Argument for Constitutionality of Jurisdiction over Nonresident Individuals*, 51 VA. L. REV. 712 (1965); Comment, *The Long Arm Shrinks: The Supreme Court and the Problem of the Nonresident Defendant in* World-Wide Volkswagon Corp. v. Woodson, 58 DEN. L.J. 667 (1981).

187. For further discussion of long-arm statutes and their effect on the "transient rule," see *infra* notes 236-45 and accompanying text.

188. ILL. ANN. STAT. ch. 110, ¶ 2-209 (1983). The statute reads in part as follows:

§ 2-209. Act submitting to jurisdiction — Process. (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts:

(1) The transaction of any business within this State;
(2) The commission of a tortious act within this State;
(3) The ownership, use, or possession of any real estate situated in this State;
(4) Contracting to insure any person, property or risk located within this State at the time of contracting;
(5) With respect to actions of dissolution of marriage and legal separation, the maintenance in this State of a matrimonial domicile at the time this cause of action arose or the commission in this State of any act giving rise to the cause of action.

189. *See, e.g.*, HAW. REV. STAT. § 634-35 (1985); IDAHO CODE, § 5-514 (1979 Supp.); WASH. REV. CODE ANN. § 4.28.185 (1988).

190. *See* Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

ject to in personam jurisdiction of the Illinois courts, whether a citizen or noncitizen of Illinois, if he transacts any business within the state, commits a tort within the state, or contracts to insure any person or property located within the state.[191] Wisconsin has also enacted such a comprehensive statute.[192] In some ways, it has gone further than Illinois in authorizing its courts to assert personal jurisdiction over nonresidents.[193] Several years after their enactment, both the Illinois and Wisconsin statutes were amended to include jurisdiction over claims involving alimony, support, and property

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191. *See supra* note 183.

192. WIS. STAT. § 801.05 (1987-88). Subsections (2) through (5) of the statute read as follows:

(2) SPECIAL JURISDICTION STATUTES. In any action which may be brought under statutes of this state that specifically confer grounds for personal jurisdiction over the defendant.

(3) LOCAL ACT OR OMISSION. In any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant.

(4) LOCAL INJURY; FOREIGN ACT. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:
  (a) Solicitation or service activities were carried on or within this state by or on behalf of the defendant; or
  (b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

(5) LOCAL SERVICES, GOODS OR CONTRACTS. In any action which;
  (a) Arises out of a promise, made anywhere to the plaintiff or to some 3rd [sic] party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff; or
  (b) Arises out of services actually performed for the plaintiff by the defendant within this state, or services actually performed for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant; or
  (c) Arises out of a promise, made anywhere to the plaintiff or to some 3rd [sic] party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to ship from this state goods, documents of title, or other things of value; or
  (d) Relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on the defendant's order or direction; or
  (e) Relates to goods, documents of title, or other things of value actually received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred.

193. *Id.* The Wisconsin statute is coupled with a provision allowing a Wisconsin action to be stayed in favor of suit in another forum when that seems desirable. The development and purpose of the Wisconsin long-arm statutes are described in Foster, *Judicial Economy; Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts*, 47 F.R.D. 73 (1969).

division against former residents.[194] Other states have enacted similar statutes.[195]

Some state long-arm statutes are more limited in application, requiring the doing of business[196] or an act or omission within the state.[197] Although judicial construction of most long-arm statutes differs, the texts are extremely similar in order to bring a given statute within the limits of constitutional due process.

C. *Nonresident Motorist Statutes*

The Supreme Court's decision in *Hess v. Pawloski*,[198] upholding the validity of a nonresident motorist statute,[199] encouraged states to utilize their police powers to enact a number of statutes asserting jurisdiction based, not only on the operation of automobiles within a state, but also on engaging in a variety of other hazardous activities or enterprises. Nonresident motorist statutes were drafted and applied to cover an even wider range of situations. They have been broadly interpreted to apply to situations where neither the plaintiff nor the defendant is a resident of the state in which the accident occurred.[200] They also apply to actions against the representative of a de-

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194. ILL. ANN. STAT. c.110, ¶ 2-209(a)(5) (Smith Hurd 1983); WIS. STAT. § 801.05(11) (1987-88).

195. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 600.701-.35 (1981). N.C. GEN. STAT. § 55-145 (1982) (foreign corporations doing business in the State); Note, *Nonresident Jurisdiction and the New England Experience*, 48 B.U.L. REV. 372 (1968).

Rhode Island enacted a long-arm statute broadly providing that "the courts of this state shall hold such foreign corporations and such nonresident individuals or their executors or administrators, and such partnerships or associations [that have the necessary minimum contacts with the state] amenable to suit in Rhode Island in every case not contrary to the provisions of the constitution or laws of the United States." R.I. GEN. LAWS § 9-5-33 (Supp. 1989). Tennessee has patterned its long-arm statute after Rhode Island. *See* TENN. CODE ANN., § 20-2-214 (Supp. 1989).

196. *See* McShan v. Omega Louis Brandt *et* Frere, S.A., 536 F.2d 516 (2d Cir. 1976); Columbia Pictures Indus., Inc. v. Schneider, 435 F. Supp. 742 (S.D.N.Y. 1977), *aff'd*, 573 F.2d 1288 (2d Cir. 1978); Development Direction, Inc. v. Zachary, 430 F. Supp. 783 (S.D.N.Y. 1976); Fowler Prods. Co. v. Coca-Cola Bottling Co. of Tulsa, Inc., 413 F. Supp. 1339 (M.D. Ga. 1976); Federal Ins. Co. v. Michigan Wheel Co., 267 F. Supp. 639 (S.D. Fla. 1967); *Cf.* Florida Towing Corp. v. Oliver J. Olson & Co., 426 F.2d 896 (5th Cir. 1970).

197. Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir. 1969). The interpretation of statutes phrased in terms of acts or omissions within the state is particularly difficult in products liability cases in which an attempt is made to secure jurisdiction over a defendant who has manufactured or produced a product outside the state that causes injury after it is shipped into the state. *Id.* at 234-36.

198. 274 U.S. 352 (1927), overruled 326 U.S. 310 (1945).

199. *See, e.g.*, WIS. STAT. ANN. § 345.09 (Supp. 1977).

200. Dart Transit Co. v. Wiggings, 1 Ill. App. 2d 126, 117 N.E.2d 314 (1953). It was impossible to bring an action involving nonresidents in a federal court in the state of the accident without a waiver of objections to venue until 1963. Since the venue requirements were not met, neither

ceased motorist,[201] and other litigation situations arising out of the negligent or reckless use of automobiles and related activities.[202]

Nonresident motorist statutes operate to require a nonresident to answer for his conduct in the state where there are causes of action alleged against him. They also operate to provide a claimant with a convenient method by which he may sue to enforce his rights.[203] Therefore, nonresident motorist statutes are another safety valve through which the "transient rule" can be eliminated.

D. Other Statutes

Nonresident motorist statutes established by *Hess* led to the enactment other statutes covering "dangerous" activities such as watercraft operation[204] and aircraft activities.[205] Another type of statute permitted jurisdiction over nonresidents engaged in selling securities.[206] These statutes are based on the fact that the activity involved was one in which the state had a

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plaintiff nor defendant resided in the district as required by 28 U.S.C. § 1391. A 1963 amendment to § 1391, which added a subsection (f), alleviated that problem. The provision permitted a civil action growing out of a tort involving "manufacture, assembly, repair, ownership, maintenance, use or operation" of an automobile to be brought in the judicial district where "the act or omission complained of occurred." 28 U.S.C. § 1391(f) (1964). That particular subsection was repealed in 1966 and replaced by amendments to subsections (a) and (b) of Section 1391, which provides that venue is proper where the claim for relief arose. *Id.*; *see also* Olberding v. Illinois Cent. R.R. Co., 346 U.S. 338 (1953), where the Court held that venue was improper in a case now covered by 28 U.S.C. § 1391(a).

201. *See, e.g.*, Milam v. Sol Newman Co., 205 F. Supp. 649 (N.D. Ala. 1962) (indicating that the secretary of state can act as an agent for the deceased nonresident for purposes of process); Hayden v. Wheeler, 33 Ill. 2d 110, 210 N.E.2d 495 (1965) (remarking that the foreign administrator of a deceased nonresident was held to be a "personal representative" and subject to jurisdiction in Illinois under its long-arm statute); *see also* Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969); Stumberg, *Extension of Nonresident Motorist Statutes to Those Not Operators*, 44 IOWA L. REV. 268, 271-72 (1959); Note, *Should Iowa Again "Reach Out" for Estate Representatives of Nonresident Motorists?*, 44 IOWA L. REV. 402 (1959).

202. *See* Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961), where the Fourth Circuit indicated that a state nonresident motorist statute can validly be applied to a nonresident automobile owner who had never been within the state but authorized the use of her car within the state; *see also* Eckman v. Baker, 224 F.2d 954 (3d Cir. 1955).

203. *Hess*, 274 U.S. at 356.

204. FLA. STAT. ANN. § 48.19 (West 1969 & 1989 Supp.). The constitutionality of Louisiana's nonresident watercraft statute was upheld in Goltzman v. Rougeot, 122 F. Supp. 700 (W.D. La. 1954).

205. 2 PA. CONS. STAT. ANN. § 1410 (Purdon 1963). In order for the statute to apply the activity must occur within that particular state or at least have a causal relationship with that particular state. *But see* Peters v. Robin Airlines, 120 N.Y.S.2d 1, 281 App. Div. 903 (1953) (action dismissed for lack of jurisdiction holding statute violates due process).

206. IND. CODE ANN. §§ 23-2-1-16 (Burns 1989 Supp.); N.Y. GEN. BUS. LAW § 352-6 (McKinney 1986); N.C. GEN. STAT. § 78A-63(f)(a) (1989).

special interest, and therefore had power to be regulated by appropriate legislation as well as the right to enforce that legislation in its courts.[207] Due to the development of new bases for asserting jurisdiction over individual defendants, the jurisdictional reach of courts became substantially broader than it had been under the strict territorial guidelines of the *Pennoyer* case.

V. PROBLEMS ASSOCIATED WITH THE "TRANSIENT RULE"

In *Shaffer v. Heitner*,[208] the United States Supreme Court held that physical power over property is no longer always a sufficient basis for exercising jurisdiction over the person.[209] The Court stated that the proper requirement is a nexus between the defendant, the controversy, and the forum.[210] The Court rejected the notion that a state may exercise jurisdiction over the person solely on the basis of their presence within the state and applied instead the "minimum contacts" analysis as described in *International Shoe Co. v. Washington*.[211] Thus, the "minimum contacts" approach together with the creation of many statutes,[212] shows little need for the "transient rule."

Although the "transient rule" has been viewed by some as a simple and straightforward rule,[213] it is also overly broad.[214] The "transient rule," in fact, is not simple at all. Rather, it creates even more of a burden on the courts by requiring them to deal with constitutional questions[215] and questions of immunity from service.[216] Further, the common law doctrine of forum non conveniens cannot be properly viewed as a safety valve for the harshness of the "transient rule."[217]

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207. Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935). The basis for the decision was that "Iowa treats the business of dealing in corporate securities as exceptional and subjects it to special regulation." *Id.* at 627.

208. 433 U.S. 186, 209 (1977).

209. *Id.*

210. For a discussion of *Shaffer*, see *supra* notes 40-46 and accompanying text.

211. *See* International Shoe v. Washington, 326 U.S. 310, 310 (1945). For a discussion of "minimum contacts," see *supra* notes 27-30 and accompanying text.

212. *See supra* notes 181-207 and accompanying text.

213. *See* Brilmayer, *supra* note 6, at 755.

214. *Id.*

215. *See supra* notes 128-37 and accompanying text.

216. *See supra* notes 138-69 and accompanying text.

217. *See infra* notes 232-35 and accompanying text.

A. Constitutional Problems

In *Shapiro v. Thompson*,[218] the United States Supreme Court indicated that the right to travel is grounded in the Constitution.[219] It is clear, however, that the "transient rule" has essentially denied the constitutional right to a defendant who refuses to enter the forum state for fear of being served with process and thus becoming subject to jurisdiction of the court.[220]

In the past, when the ability to travel was limited by early forms of transportation, causes of action usually arose between persons residing in the same state.[221] The "transient rule" was thus considered to be "fair" in that normally the defendant was not put in the position of having to defend an action in a place with which he had no contacts other than his mere presence.[222] Today, however, due to the amount and variety of travel, it is much more likely that cases will arise in which the forum state will have little or no connection with the litigation. The "transient rule" should be abolished not only on constitutional grounds,[223] but also because of the rule's rather consistent violation of the "fairness standard" established in *International Shoe*.[224]

B. Problems of Simplicity

Although the "transient rule" has been recognized as a welcome addition to our overly complex and litigious society,[225] it has in fact been overly burdensome on the courts.[226] Rather than allowing the courts to apply the standard universally the harshness of the "transient rule" has instead forced the courts to apply standards of immunity to certain individuals who are only transiently present in the forum state.[227] Courts have had to make rulings on immunity for parties,[228] witnesses,[229] non-trial situations,[230] and

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218. 394 U.S. 618 (1969).

219. *Id.*

220. *See* Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959).

221. *See* Comment, *Developments in the Law — State-Court Jurisdiction*, 73 HARV. L. REV. 909, 938 (1960).

222. *Id.* Another commentator has stated that "the mere presence of the defendant . . . is probably insufficient to support jurisdiction over claims unrelated to his activities within the forum." Karst, *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 160 (1977).

223. *See supra* notes 128-37 and accompanying text.

224. For a discussion of *International Shoe*, see *supra* notes 21-30 and accompanying text.

225. *See* Brilmayer, *supra* note 6, at 755.

226. *See supra* notes 121-80 and accompanying text.

227. *See supra* notes 138-69 and accompanying text.

228. *See supra* notes 142-46 and accompanying text.

229. *See supra* notes 147-51 and accompanying text.

230. *See supra* notes 152-57 and accompanying text.

enticement into the jurisdiction.[231] The abolition of the "transient rule" would relieve courts of the burden of applying such immunity standards.

C. *The Problem of Forum Non Conveniens: Is It Really a Safety Valve?*

Some courts have upheld transient jurisdiction under the belief that the doctrine of forum non conveniens[232] will prevent abuses of the "transient rule."[233] A few commentators concur with this belief.[234] Forum non conveniens dismissals, however, are usually made only upon waving certain defenses in the new forum.[235] The doctrine is thus not a safety valve at all. It can only be used effectively when a forum is seriously inconvenient to a defendant, irrespective of whether the "transient rule" applies.

VI. ALTERNATIVES TO THE "TRANSIENT RULE"

A. *The Use of Statutes*

Most commentators agree that state long-arm statutes[236] are a necessity in today's complex and litigious society.[237] Statutes covering corporate[238] and individual[239] acts or omissions, along with nonresident motorist,[240] aircraft activities,[241] and watercraft operation[242] will operate as substitutes for the harsh "transient rule."[243] These statutes not only encourage the joinder of all parties to the dispute, including those who are nonresidents of the state, but also promote the modern policy of disposing of complex or multiparty disputes in one suit.[244] Further, long-arm statutes "promote the determination of jurisdictional questions on the basis of the relationship of [the] defendant and the dispute to the forum state. . . ."[245] They are, there-

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231. *See supra* notes 158-69 and accompanying text.

232. For a definition and discussion of the doctrine forum non conveniens, see *supra* notes 170-80 and accompanying text.

233. *See, e.g.*, Amusement Equip., Inc. v. Mordelt, 779 F.2d 264, 271 (5th Cir. 1985); Aluminal Indus., Inc. v. Newtown Commercial Ass'n, 89 F.R.D. 326, 329-30 (S.D.N.Y. 1980).

234. *See, e.g.*, Bernstine, *supra* note 6, at 66; Ehrenzweig, *supra* note 3, at 305.

235. *See, e.g.*, Opert v. Schmid, 535 F. Supp. 591, 594-95 (S.D.N.Y. 1982).

236. *See supra* notes 181-207 and accompanying text.

237. *See supra* note 186.

238. *See supra* note 183.

239. *See supra* notes 188 and 192.

240. *See supra* notes 198-203 and accompanying text.

241. *See supra* note 205.

242. *See supra* note 204.

243. The substitution must be done along with "minimum contact" analysis in *International Shoe*.

244. *See* 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1068, at 336.

245. *Id.*

fore, better adapted to take into consideration fairness and convenience factors than the *Pennoyer* philosophy with its reliance on territorial power.

B. The Use of "Minimum Contacts"

The "minimum contacts" analysis of *International Shoe Co. v. Washington*,[246] implemented by state long-arm statutes, is a sufficient means for assuring jurisdiction in those cases where the defendant's transient presence is related to other contacts with the forum state.[247] These methods were not available when the territorial power theory was announced.[248]

In *International Shoe*, however, Chief Justice Stone firmly established that:

> Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties or relations.[249]

It therefore seems reasonable to conclude that "minimum contacts" promote fairness and are consistent with the fourteenth amendment.[250]

In *World-Wide Volkswagen Corp. v. Woodson*,[251] the Supreme Court did not directly address the issue of whether service in the forum by itself confers jurisdiction.[252] Justice White, however, did discuss the paramount importance of "minimum contacts":

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246. 326 U.S. 310 (1945).

247. For a discussion of the "minimum contacts" analysis as outlined in *International Shoe*, see *supra* notes 27-30 and accompanying text.

248. The "territorial power" theory was established in Pennoyer v. Neff, 95 U.S. 714, 722 (1878); *see supra* note 4.

249. *International Shoe*, 326 U.S. at 319.

250. *See supra* note 28 and accompanying text.

251. 444 U.S. 286 (1980).

252. *Id. World-Wide* was a products liability action stemming from an automobile accident in Oklahoma. Plaintiffs had purchased the automobile in New York while they were New York residents, and were passing through Oklahoma on their way to a new home in Arizona when the accident occurred. Suit was brought in an Oklahoma state court against the automobile's manufacturer, its importer, its regional distributor, and its retail dealer. The regional distributor, World-Wide Volkswagen Corporation (World-Wide), and the retail dealer Seaway Volkswagen, Inc. (Seaway), entered special appearances claiming that the forum's assertion of jurisdiction over them would offend the due process clause of the Fourteenth Amendment. *Id.* at 288.

World-Wide was a New York corporation distributing vehicles, parts, and accessories to retailers in New York, New Jersey, and Connecticut. Seaway also was incorporated in New York, where it had its sole place of business. Although neither company did business in Oklahoma, the trial court rejected the defendants' constitutional claims. *Id.* at 289. The Oklahoma Supreme

> The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.[253]

Thus, it seems that "minimum contacts" have been stressed by courts more and more as being extremely important. So important that they must be used to promote fairness in *all* circumstances, even those where an individual is only transiently present in the forum state.

VII. THE ABOLITION OF THE "TRANSIENT RULE": ITS EFFECTS ON PLAINTIFFS, DEFENDANTS AND THE JUDICIAL SYSTEM

If the "transient rule" were abolished, the judicial system would become more fair and efficient.[254] Only one commentator to date has attempted to outline the possible ramifications of the "transient rule's" abolishment.[255] Although it is difficult to predict the future ramifications that would arise if the "transient rule" were abolished, the following is an attempt to predict the practical and primary impact upon plaintiffs, defendants and the judicial system.

A. Effects on the Plaintiffs

If the "transient rule" were abolished, plaintiffs would be forced to file their claims in a number of jurisdictions in order to ensure that the statute of limitations was tolled.[256] There would also be an increase in the amount of expenses incurred by the plaintiff due to filing fees.[257] On the other hand,

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Court denied defendants a writ of prohibition to restrain the trial judge from exercising in personam jurisdiction over them and held that personal jurisdiction was authorized by the state's long-arm statute. *Id.*

The United States Supreme Court reversed, refusing to allow personal jurisdiction based "on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma." *Id.* at 295.

253. *Id.* at 291-92.

254. Some commentators have interpreted *Shaffer* as abolishing the "transient rule;" *see, e.g.*, Casad, *supra* note 186, at 47; Sedler, *supra* note 6, at 1035. *But see* Bernstine, *supra* note 6, at 47; Brilmayer, *supra* note 6, at 752; Fyr, *supra* note 6, at 770-72; Zammit, *supra* note 6, at 23-4; Note, *supra* note 6, 713 n.3.

255. *See* Posnak, *supra* note 3, at 748-70.

256. The term "tolled" means to suspend or stop temporarily the running of the statute of limitations. BLACK'S LAW DICTIONARY 1334 (5th ed. 1979).

257. The costs may go even higher if there is a need to litigate the jurisdiction issue.

it is certain that a plaintiff generally has at least one forum, if not several, in which to sue the defendant.[258]

Although at first glance the abolition of the "transient rule" would seem to cause a tremendous disadvantage to plaintiffs, certain advantages would result. Plaintiffs often waste considerable expense and energy serving the defendant.[259] They will also be relieved of penalties issued by courts for technical defects of quashing service.[260] In addition, there would be fewer instances in which the plaintiff is deprived of his or her day in court because of the defendant's avoidance of service of process.[261]

B. Effects on the Defendants

Defendants would receive many benefits if the "transient rule" were abolished. Potential defendants would not have to ensure that they were immune from service before entering the forum.[262] Extinguishing the "transient rule" would also relieve the need for a defendant to give up a potential claim or defense while being subject to jurisdiction in an inconvenient forum.[263] Further, defendants would not suffer deprivation of their constitutional right to interstate travel.[264]

If "transient rule" were abolished, it would also be less likely for defendants to be subjected to an unfair choice of law.[265] In addition, more defendants would be relieved of the humiliation of being served when they are in the company of others.[266] Finally, the abolition of the "transient rule" would relieve the pressure on defendants who are forced to settle their suits

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258. *See* Posnak, *supra* note 3, at 749.

259. Lacy, *supra* note 6, at 514. This result, however, could be avoided if the *International Shoe* standard along with state long-arm statutes were used by a prudent attorney to determine alternative bases of jurisdiction and alternative means of supplying notice.

260. *See* Lacy, *supra* note 6, at 512-13.

261. *Id.* at 514.

262. *See supra* notes 138-69 and accompanying text.

263. *See* Posnak, *supra* note 3, at 760-61.

264. *See supra* notes 128-37, 218-24 and accompanying text.

265. This curtailment of forum shopping could be the difference between whether the plaintiff will win or lose the lawsuit. On the other hand, although this result is theoretically possible, it is unlikely. If the forum in which the defendant was served has no legitimate interest in the litigation, it could not constitutionally apply its own substantive law unless it coincided with the law of some interested state. *See* AllState Ins. Co. v. Hague, 449 U.S. 302 (1981); Home Ins. Co. v. Dick, 281 U.S. 397 (1930). There might be some rare situations when denying jurisdiction to the forum in which the defendant is served might result in denying a body of law favorable to the plaintiff. Nevertheless, it is a dubious proposition that the courts should encourage this type of forum shopping. *See* Posnak, *supra* note 3, at 752 n.99. Similarly, the plaintiff's ability to shop for a forum where jurors and judges are perceived as more favorable would also be curtailed. This is the appropriate position for courts to take. *See id.* at 753.

266. *See* Posnak, *supra* note 3, at 764.

due to the inconvenience and expense of litigating either a jurisdictional question[267] or a trial itself in such an inconvenient forum.

C. *Effects on the Judicial System*

The judicial system would also benefit if the "transient rule" were abolished. Those issues dealing with whether the defendant was immune from service because he was in the forum in connection with other litigation,[268] or because he was enticed into the forum,[269] could be avoided. These issues generally take a considerable amount of judicial energy to resolve.[270]

If the "transient rule" were abolished, there would also be fewer occasions for a court to consider the issue of forum non conveniens.[271] This may represent a significant conservation of judicial time, energy and expense because resolution of the forum non conveniens issue frequently requires numerous factual determinations to be made, and a subjective balancing of necessary interests.[272]

In addition, the judicial system would not have to be as concerned with whether a proper person served the process,[273] the person served was authorized to receive the process,[274] service was at the proper location,[275] or the proper manner of service was followed.[276] Further, if the "transient rule" were abolished, there would be a reduction of court costs.[277]

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267. Aware of the expense that would be incurred to litigate in the forum, some prudent defendants may choose to default or settle despite their beliefs that they have good defenses on the merits and that they could prevail in having their cases dismissed on the grounds of forum non conveniens. For a discussion of the doctrine of forum non conveniens, see *supra* notes 170-80 and accompanying text.

268. *See supra* notes 138-57 and accompanying text.

269. *See supra* notes 158-69 and accompanying text.

270. The judicial energy that is expended can be appreciated by the volume of cases on the topic. *See supra* notes 138-69 and accompanying text; *see also* 4 C. WRIGHT & A. MILLER, *supra* note 6, §§ 1076-81.

271. For a discussion of the doctrine of forum non conveniens, see *supra* notes 170-80 and accompanying text.

272. *Id.* The court would also be relieved of even having to decide the doctrine of forum non conveniens.

273. *See* 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1089.

274. *Id.* §§ 1094, 1074-1111.

275. *Id.* § 1096.

276. *Id.* § 1095. This would be limited to the extent necessary to determine whether the attempt at notice was "reasonably calculated" to give defendant actual notice of the lawsuit. *See also* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

277. *See* Posnak, *supra* note 3, at 766.

Although the parties may cover the costs of personal service to a certain extent, the system inevitably must absorb some of these costs.[278]

Finally, if the "transient rule" were abolished, it would "no longer be necessary [for the courts] to spend any time on motions to quash raising purely formal objection."[279] As the Court noted in *Shaffer*, "the fairness standard of *International Shoe* can be easily applied in the vast majority of cases."[280] It also seems that the "fairness standard" from *International Shoe* will become easier to apply as more experience is gained from utilizing it.

VIII. CONCLUSION

The "transient rule" has overstayed its welcome. It was originally developed based on the rationale that the states had complete authority over persons and things within their borders.[281] Transient jurisdiction, however, once thought to be a simple and efficient vehicle for our litigious society, has compelled courts to decide difficult and time consuming issues of immunity from service of process.[282] The United States Supreme Court has established a "minimum contacts" standard[283] that can be used along with state long-arm statutes[284] to act as a "fair" alternative to the "transient rule."

These substitutes should be used for a number of reasons. First, they are consistent with the due process clause of the fourteenth amendment[285] and the constitutional right to interstate travel.[286] Second, they would lessen the flood of litigation due to immunity and service of process issues.[287] Finally, they would have a positive effect on plaintiffs, defendants, and the judicial system.[288]

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278. For example, the fees paid to the marshall or sheriff who serve process are greater than the amount charged to the parties to have the process served.

279. Lacy, *supra* note 6, at 517.

280. *Shaffer*, 433 U.S. at 211.

281. *See supra* note 4.

282. *See supra* notes 138-69 and accompanying text.

283. *See supra* notes 246-53 and accompanying text.

284. *See supra* notes 181-207 and 236-45 and accompanying text.

285. *See supra* note 250.

286. *See supra* notes 128-37 and 218-24 and accompanying text.

287. *See supra* notes 138-69 and accompanying text.

288. *See supra* notes 254-80.

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